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PACIFIC AIRMOTIVE CORPORATION

BEFORE THE STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

IN THE MATTER OF THE CALIFORNIA	)	
REGIONAL WATER QUALITY CONTROL	)	
BOARD, LOS ANGELES REGION WELL	)	
INVESTIGATION PROGRAM - SOIL	)	
GAS INVESTIGATION, PACIFIC	)	PETITION BY PACIFIC
AIRMOTIVE CORPORATION,	)	AIRMOTIVE CORPORATION
2940 N. HOLLYWOOD WAY,	)	
BURBANK, CALIFORNIA	)	
(FILE NO. 104.0812)	)	

PETITION FOR REVIEW  
AND  
REQUEST FOR STAY

4/2/93

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PETITION FOR REVIEW  
AND  
REQUEST FOR STAY

I. INTRODUCTION

PACIFIC AIRMOTIVE CORPORATION (hereinafter "PAC" or "Petitioner") respectfully requests that the STATE WATER RESOURCES CONTROL BOARD (hereinafter "State Water Board" or "State Board") review the March 19, 1993 directive issued by the CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION (hereinafter "Regional Board") requiring the submission by PAC of a workplan for a soil gas investigation at PAC's facility

at 2940 N. Hollywood Way, Burbank, California. PAC also requests a stay of the Regional Board's directive pending this appeal.

II. CONTENTS REQUIRED BY CALIFORNIA ADMINISTRATIVE CODE  
TITLE 23, SECTION 2050

A. Name and Address of the Petitioner:

Pacific Airmotive Corporation, 2940 N. Hollywood Way,  
Burbank, California 91505. Counsel for Petitioner: Swidler &  
Berlin, Chartered, 3000 K Street, N.W., Suite 300, Washington,  
D.C. 20007, Attention: Thomas M. Downs, Esq./Jerome C. Muys, Jr.,  
Esq.

B. The Specific Action or Inaction of the Regional Board  
Which Petitioner Requests the State Water Board to  
Review:

Petitioner requests review of the March 19, 1993 directive of the Regional Board requiring submission by PAC of a workplan for a soil gas investigation (hereinafter "Soil Gas Directive") at PAC's Burbank facility. A copy of the March 19, 1993 Soil Gas Directive is attached as Exhibit A.

C. The Date on Which the Regional Board Acted or Refused  
to Act or on Which the Regional Board was Requested to  
Act:

March 19, 1993.

D. A Full and Complete Statement of the Reasons the Action  
or Failure to Act was Inappropriate or Improper:

1. The Regional Board's Soil Gas Directive exceeded the Regional Board's authority under Water Code § 13267 because it was not issued in connection with the establishment or review of any water quality control plan or waste discharge requirement or

in connection with any other statutorily-authorized action as required by Water Code § 13267(a).

2. There is no substantial evidence in light of the whole record to support a finding that PAC is a person "discharging or proposing to discharge waste" to groundwater from its Burbank facility within the meaning of Water Code § 13267(b). The Regional Board made no such finding. Accordingly, the Soil Gas Directive is illegal and exceeds the statutory authority of the Regional Board.

3. The Soil Gas Directive is not supported by substantial evidence in light of the whole record, and is contrary to Water Code § 13267(b), which requires that the burden, including costs, of the reports required by a Regional Board under that section must bear a reasonable relationship to the need for the reports and the benefits to be obtained therefrom.

4. The action of the Regional Board in issuing the Soil Gas Directive to PAC was arbitrary and capricious.

5. The procedure (or lack thereof) utilized by the Regional Board in issuing the Soil Gas Directive deprived PAC of due process of law.

E. The Manner in Which the Petitioner is Aggrieved:

Petitioner is aggrieved by the wrongful issuance to it of the Soil Gas Directive.

F. The Specific Action by the State or Regional Board Which Petitioner Requests:

Petitioner requests that the Soil Gas Directive be withdrawn.

- G. A Statement of Points and Authorities in Support of Legal Issues Raised in the Petition:

See section V, below.

- H. A List of Persons, if any, Other Than the Petitioner and Discharger, if not the Petitioner, Known by the Regional Board to Have an Interest in the Subject Matter of the Petition:

A copy of the list obtained from the Regional Board is attached as Exhibit B.

- I. A Statement That the Petition has Been Sent to the Appropriate Regional Board and to the Discharger, if not the Petitioner:

See attached Proof of Service.

- J. A Copy of a Request to the Regional Board for Preparation of the Regional Board Record, Including a Copy of the Tape Recording of the Regional Board Action or a Transcript, if Available:

A copy of Petitioner's request is attached as Exhibit C.

### III. REQUEST FOR EVIDENTIARY HEARING

In accordance with Cal. Code of Regulations § 2050(b), Petitioner hereby requests a full evidentiary hearing with regard to its request to the State Water Board for review and stay of the Soil Gas Directive. As Petitioner has not been advised of the contents of the Regional Board record supporting the issuance of the Soil Gas Directive, Petitioner does not know at this time what additional evidence it may wish to present at the hearing or what facts it may wish to prove. However, Petitioner expects to establish facts bearing on the absence of any evidence that PAC is a person "discharging or proposing to discharge waste" to groundwater from its Burbank facility. Petitioner reserves the

right, upon review of the Regional Board record, to identify additional facts to be proved at the hearing. The Regional Board did not make provision for the taking of evidence (at least from Petitioner) prior to the issuance of the Soil Gas Directive, and thus Petitioner provided no such evidence.

#### IV. REQUEST FOR STAY

In accordance with Cal. Code of Regulations § 2053(a), Petitioner hereby requests a stay of the Soil Gas Directive. Petitioner has attached hereto as Exhibit D an affidavit of Richard H. Lange setting forth proof that (1) substantial harm to Petitioner will result if a stay is not granted; (2) no substantial harm to other interested persons or to the public interest will result if a stay is granted and (3) there are substantial questions of fact and law regarding the Regional Board's issuance of the Soil Gas Directive to PAC.

#### V. POINTS AND AUTHORITIES IN SUPPORT OF PAC'S PETITION FOR REVIEW AND REQUEST FOR STAY

##### A. FACTUAL BACKGROUND

PAC owns and operates a commercial aircraft engine maintenance and service facility which is located at 2940 North Hollywood Way in Burbank, California. The facility includes a number of jet engine test cells where the performance of the engines is tested.

Over the last eight years, PAC has undertaken an exhaustive subsurface investigation at its Burbank facility at the direction



of the Regional Board. The various investigative activities required by the Regional Board have included a three-phase soil and groundwater investigation in the area of a former jet fuel spill, and an extensive soil boring and leak detection program in the vicinity of the facility's present and former drum storage areas, underground solvent storage tanks, and sumps and industrial clarifiers. In connection with this investigation, PAC agreed to conduct a comprehensive groundwater monitoring program at the facility. The costs of the various investigative activities required by the Regional Board are estimated to have exceeded \$400,000.

The extensive soil investigations conducted by PAC at its Burbank facility indicate that no contaminants from PAC's operations have or reasonably can be expected to reach groundwater. These investigations establish conclusively that there is no contaminant plume from the PAC facility to groundwater.

During the pendency of PAC's subsurface investigations, similar studies were being conducted at the direction of the Regional Board at several facilities located immediately upgradient of the PAC facility which are operated by Lockheed Corporation. As a result of these studies, the Regional Board determined that highly contaminated ground water pollution is present beneath the Lockheed facilities, and that the contamination appears to have originated from those facilities.

On December 22, 1992, the Regional Board issued to Lockheed and others Cleanup and Abatement Order No. 92-066, which requires certain investigative and cleanup activities at two of the Lockheed facilities located adjacent to PAC's facility. PAC was included as a Respondent on Order No. 92-066, on the grounds that PAC had operated one of the Lockheed facilities prior to 1980. PAC has appealed Order No. 92-066 on the grounds, inter alia, that there is no evidence that PAC "caused or permitted" waste to be discharged from the Lockheed facilities within the meaning of Water Code § 13304. The State Board has stayed the Order and remanded the matter to the Regional Board for further proceedings.

On December 23, 1992, David A. Bacharowski, an "Environmental Specialist IV" employed by the Regional Board, wrote to PAC advising the company of the soil and groundwater contamination detected at the adjacent Lockheed facilities. According to the December 23, 1992 letter, a soil gas investigation at the Lockheed facilities had detected the presence of elevated levels of volatile organic compounds, aromatic hydrocarbons, and ketones in soils located immediately to the north and east of PAC's facility. The letter concluded as follows:

Based upon the relatively high concentration of VOCs identified in the areas immediately north and east of your company's property lines, a detailed soil gas investigation at your property at 2940 North Hollywood Way, Burbank, is required in order to determine the lateral and vertical extent of soil contaminants in vapor phase, delineate the source areas with the most contaminated soils, and provide data for developing an

area-wide soil cleanup plan to preclude further migration of contaminants in the subsurface and to protect groundwater resources. You are hereby directed to submit a workplan for conducting a soil gas investigation at your facility.

The letter cited no legal authority for the request. A copy of Mr. Bacharowski's December 23, 1993 letter is attached as Exhibit E.

On January 20, 1993, PAC wrote to Mr. Bacharowski and respectfully declined to comply with the request in Mr. Bacharowski's December 23, 1992 letter that PAC conduct a soil gas investigation at PAC's facility. PAC pointed out that extensive soil investigations had been conducted at the facility, and that those investigations indicated that PAC was not discharging wastes to groundwater. PAC further stated that the groundwater contamination in the vicinity of the PAC facility was originating from other sources, and that the Regional Board lacked authority to require PAC to investigate such discharges. A copy of PAC's January 20, 1993 letter is attached as Exhibit F.

By letter dated February 5, 1993 from Roy R. Sakaida, a "Supervising Water Resource Control Engineer" employed by the Regional Board, PAC again was requested to conduct a soil gas investigation at PAC's Burbank facility. The letter cited as authority for the request Water Code § 13267(b). Apparently in response to PAC's statement in its January 20, 1992 letter that the subsurface investigations had established that PAC was not a "discharger," Mr. Sakaida's letter further stated that "[t]his Regional Board has never concluded that PAC has not contributed

to groundwater contamination nor any impacts of offsite discharge sources on PAC's facility." In subsequent discussions with Regional Board personnel, PAC again declined to comply with the request. A copy of Mr. Sakaida's February 5, 1993 letter is attached as Exhibit G.

On March 19, 1993, the Regional Board's Executive Director and authorized representative, Robert P. Ghirelli, issued to PAC a directive requiring the submission to the Regional Board by PAC of the subject soil gas investigation workplan. This constituted the first formal action of the Regional Board with respect to the requested soil gas investigation, and is the subject of this petition for review.

B. PROCEDURAL BACKGROUND

The Soil Gas Directive was received by PAC on March 22, 1993. PAC was provided no notice or opportunity for hearing prior to issuance of the Directive. Essentially, the Regional Board issued an ex parte order.

To PAC's knowledge, the Regional Board issued the Soil Gas Directive without compiling an administrative record and without according interested parties an opportunity to identify and submit additional evidence. PAC assumes for purposes of this Petition that the Regional Board's evidence supporting the Directive consists of that set forth in the various correspondence discussed above relating to the requested soil gas investigation.

C. LEGAL FRAMEWORK

Water Code Section 13267 provides that "[a] regional board, in establishing or reviewing any water quality control plan or water discharge requirements, or in connection with any action relating to any plan or requirement or authorized by this division, may investigate the quality of any waters of the state within its region." Water Code § 13267(a). Section 13267 further provides that, "[i]n an investigation specified in subdivision (a), the regional board may require that any person discharging or proposing to discharge waste . . . shall furnish, under penalty of perjury, those technical or monitoring program reports as the board may specify." Water Code § 13267(b). In addition, section 13267 requires that "[t]he burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained therefrom." Id.

D. DETAILED STATEMENT OF REASONS AND SUPPORTING POINTS AND AUTHORITIES

1. THE SOIL GAS DIRECTIVE IS BEYOND THE LEGAL AUTHORITY OF THE REGIONAL BOARD UNDER WATER CODE SECTION 13267(a)

Pursuant to Water Code section 13267(b), the statutory authority cited by the Regional Board in the subject Soil Gas Directive, a Regional Board may require the provision of technical or monitoring program reports "[i]n an investigation specified in subdivision (a)." Section 13267(a) provides that "[a] regional board, in establishing or reviewing any water quality control plan or waste discharge requirements, or in

connection with any action relating to any plan or requirement or authorized by this division, may investigate the quality of any waters of the state within its region." Water Code § 13267(a).

To PAC's knowledge, the Regional Board has not requested the subject soil gas investigation in connection with the establishment or review of a water quality control plan under Water Code § 13240, nor in connection with the establishment or review of waste discharge requirements pursuant to Water Code § 13263. Moreover, it does not appear that the Soil Gas Directive was issued in connection with any other action of the Regional Board authorized under Division 7 of the California Water Code. Thus, the Regional Board lacks legal authority to require PAC to conduct the subject soil gas investigation at PAC's facility pursuant to Water Code § 13267.

2. PAC IS NOT A PERSON DISCHARGING OR PROPOSING TO DISCHARGE WASTE WITHIN THE MEANING OF SECTION 13267(b)

Water Code § 13267(b) provides that the Regional Board may require technical or monitoring program reports from "any person discharging or proposing to discharge waste." There is insufficient evidence to support a finding that PAC is "person discharging or proposing to discharge waste."

The term "discharge" is not defined in the statutory authority cited by the Regional Board, the Porter-Cologne Water Quality Act. However, the term "discharger" is defined in California's water regulations which provide, in pertinent part, that a "discharger is any person who discharges waste which could affect the quality of waters of the state." Title 23, Calif.

Admin. Code § 2601. As discussed above, the extensive subsurface investigations conducted by PAC at its Burbank facility have confirmed that no contaminants from PAC's operations have entered groundwater or reasonably could be expected to do so. Therefore, the Regional Board lacks authority under Section 13267 to require the subject soil gas investigation.

3. THE BURDEN, INCLUDING COSTS, OF THE SOIL GAS INVESTIGATION DOES NOT BEAR A REASONABLE RELATIONSHIP TO THE NEED FOR THE INVESTIGATION AND THE BENEFITS TO BE OBTAINED THEREFROM

In determining whether to require a "discharger" to furnish technical or monitoring program reports, the Regional Board must find that the burden, including costs, of the reports bears a reasonable relationship to the need for the report and the benefits to be obtained therefrom. Waste Code § 13267(b). To PAC's knowledge, the Regional Board has made no such finding.

PAC has been advised that the minimum cost of the soil gas investigation required by the Regional Board would be \$30,000. This estimate includes only the cost of the on-site investigative work, and not the costs associated with preparation of the required reports and other administrative costs. In light of the fact that, conservatively estimated, PAC's expenditures to date in conducting subsurface investigations at its Burbank facility exceed \$400,000, and that those investigations have established conclusively that no contaminants from PAC's operations have or reasonably could be expected to reach groundwater, the Regional Board's requested soil gas investigation is not warranted under the cost/benefit analysis required by section 13267.

4. THE PROCEDURE (OR LACK THEREOF) UTILIZED BY THE  
REGIONAL BOARD IN ISSUING ORDER NO. 92-066 DEPRIVED PAC  
OF DUE PROCESS OF LAW

The procedure (or lack thereof) utilized by the Regional Board in issuing its March 19, 1993 Soil Gas Directive failed to adhere to the fundamental principles of justice and fair play required. To the contrary, the Regional Board exercised its authority without affording PAC an opportunity to be heard, to defend, enforce, or protect its rights, and failed to conduct the proceeding in a manner which would allow the State Board or a court to determine whether applicable rules of law and procedure were observed.

In addition, it was improper for the Regional Board to use as the basis for its issuance of the Soil Gas Directive information from its files or other records without identifying such information and giving PAC an opportunity to contest such information. Therefore, the PAC has been deprived of due process of law and the Order is illegal.

VI. CONCLUSION

For the foregoing reasons, PAC respectfully submits that the issuance of the Regional Board's March 19, 1993 Soil Gas Directive was improper, inappropriate, unlawful, and not supported by substantial evidence. PAC respectfully requests



that the State Board grant this Petition and review the Regional Board's action in issuing the Soil Gas Directive to PAC.

DATED: April 2, 1993

Respectfully Submitted,  
SWIDLER & BERLIN

By: Jerome C. Muys, Jr.  
THOMAS M. DOWNS  
JEROME C. MUYS, JR.